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MICHAEL RODAK, JR., CLI

No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY, INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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Question Presented

Did the Court of Appeals correctly apply *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1967) (*"Carroll"*) by holding that theatrical agents, who obtain employment and negotiate terms of employment for and who stand in an economic interrelationship with union members affecting legitimate union interests, are part of the union's labor group for purposes of the application of the statutory exemption to the antitrust laws and by holding that Actors' Equity Association's regulation of theatrical agents was for a legitimate union purpose?

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Actors' Equity Association and Donald Grody respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Second Circuit (Lumbard, Mansfield and Bartels) in this case. That opinion is reported at 622 F.2d 647.

Statement of the Case

Petitioners are theatrical agents who are in the business, *inter alia,* of placing actors in jobs in the legitimate theatre field. Actors' Equity Association ("Equity") is a labor union representing actors in the legitimate theatre field throughout the United States. Equity has long required that theatrical agents representing its members abide by certain regulations ("agency regulations") instituted and maintained by Equity for the purpose of protecting its members from exploitation by theatrical agents.*

Equity has collective bargaining agreements with most theatrical producers throughout the country, establishing the minimum terms and conditions of employment (which vary, depending on the type of production. For Broadway shows, minimum or "scale" was $285 per week as of June 1976). An actor is free to negotiate salary and other terms more, but not less, favorable than those prescribed in the applicable collective bargaining agreement.

As a matter of general industry practice, producers seek actors and actresses for their productions through agents, and an actor without an agent simply does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor with an agent.

Plagued by historic and endemic high unemployment in the legitimate theatre, actors have been acutely vulnerable to exploitation by theatrical agents, whose activities directly and substantially affect the actor's access to work. Vulnerability to agent overreaching is particularly great for those performers without an established reputation who make up the vast majority of Equity's members.

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* *See Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929).

Equity therefore requires agents representing its members to be licensed by Equity, and requires licensed agents to abide by the union's regulations of their relationship with actor-members, including regulations limiting commissions; regulations limiting the duration and terms of exclusive contracts between actor and agent; regulations designed to ensure performance by agents of their fiduciary obligations to actors and to eliminate conflicts of interest on the part of agents in their representation of actor-members; regulations prohibiting agents from placing actors with producers who still owe actors' salaries from prior productions or have defaulted on other financial obligations under Equity collective bargaining agreements; and regulations facilitating dispute resolution.

In May 1978, Petitioners commenced an action challenging Equity's agency regulations under the Sherman Act. Following denial by the District Court of Petitioners' motion for preliminary injunction and affirmance by the Court of Appeals of said denial, the District Court, after a bench trial, dismissed the complaint, holding that Equity's agency regulations were protected by the statutory exemption to the antitrust laws. The Court of Appeals affirmed.

In affirming the judgment of the District Court, the Court of Appeals upheld the findings that the agents were in an economic interrelationship with union members affecting legitimate union interests within the meaning of the first prong of the *Carroll* statutory labor exemption test, and that the goal pursued by Equity in the regulation of agents was within the area of the union's legitimate self-interest under the second prong of the statutory labor exemption test. The Court of Appeals stated:

> In the case at bar, Equity, through its franchising system, seeks primarily to protect from encroachment a minimum wage in an industry where the maintenance

> of a minimum wage poses problems of particular intractability. The possibility that job-hungry actors will work through agents who take excessive commissions is a matter of legitimate union concern. The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy.
>
> (App. A3(c)-A4-A4(c))*

Reasons for Denying the Writ

The petition for certiorari should be denied because the Second Circuit's decision is a clearly correct and routine application of *Carroll* and its progeny. Every court which has considered the matter has ruled consistently with the Second Circuit's decision here. Petitioners have presented no reason for the granting of certiorari other than a desire to have this Court review a lower court's application of established precedent.

A. None of the Considerations Governing Review on Certiorari Obtains Here.

The considerations cited in Rule 19 of the Rules of the Supreme Court as militating for the granting of review on a writ of certiorari are notably absent in the instant case. In relevant part, Rule 19 states that the following indicates the character of reasons which will be considered.

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been,

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* References to pages in Petitioners' appendix denominated "*(continued)*" will appear in this form.

> but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

None are present here.

The decision below is not in conflict with any decision of another court of appeals on the same matter. Indeed, each and every court decision on the matter has been consistent with and supportive of the Second Circuit's decision.*

The Court of Appeals has not "decided an important question of federal law which has not, but should be, settled by this court." There is no suggestion that regulation of agents has been of concern to labor unions anywhere other than in the entertainment industry, where it is "necessary or customary for union members to secure employment through agents"; where "because of industry structure, [agents] stand athwart of wages paid by employers to union members" (App. A3(c)-A4); and where, because of extreme job scarcity, agents are in a unique position to exploit the employees they represent. The issue is thus not one of general application or importance.

But even assuming that an "important question of federal law" is involved, it has *already been* decided by this court. *Carroll, supra.* As is shown below, Petitioners' efforts to distinguish this case from *Carroll* are completely unavailing.

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* *Carroll, supra; Adams Ray & Rosenberg* v. *William Morris Agency*, 411 F.Supp. 403 (C.D.Cal. 1976); *Garrett* v. *American Fed. of Musicians*, 98 L.R.R.M. 2078 (D.S.C. 1978); *Redfield* v. *American Fed. of Musicians*, 603 F.2d 214 (2d Cir. 1979).

Finally, there is no suggestion that the Second Circuit "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." To the contrary, the Second Circuit's decision constituted reasoned and correct affirmance of a careful and correct District Court opinion.

B. The Second Circuit Correctly Applied the Statutory Labor Exemption Under *Carroll* to the Facts of the Instant Case.

Because of the broad literal reach of the Sherman Act, Congress enacted statutes to make clear that the antitrust laws were not intended to reach legitimate labor union activities. See Sections 6 and 20 of the Clayton Act (29 U.S.C. §§17 and 52) and the Norris-LaGuardia Act (29 U.S.C. §§101-115). Under what has come to be known as the "statutory exemption" * to the antitrust laws, union activity undertaken for a legitimate union purpose and not in combination with any non-labor group is exempt from the antitrust laws. *United States* v. *Hutcheson,* 312 U.S. 219 (1941).

Among the protections that Equity has long provided for its members is the regulation of theatrical agents who are in the business of obtaining employment for actors

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* What has come to be known as the "nonstatutory labor exemption" protects combinations with non-labor groups (*e.g.*, employers in collective bargaining relationships) concerning subjects intimately related to wages, hours and working conditions and involving restraints on competition no broader than necessary to accomplish the union's legitimate purpose. In view of the findings of both courts below that Equity did not combine with non-labor groups (App. A2(c)-A3; App. B4(c)-B5), Petitioners do not assert that the nonstatutory exemption is before this Court. Thus, *Connell* v. *Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) and other nonstatutory exemption cases have no application here.

and taking a percentage of earnings as commission. The evidence at trial amply established that the purpose for Equity's institution fifty years ago and maintenance to date of its agency regulation system was to protect its historically under-employed members from exploitation by theatrical agents who susbtantially affect an actor's access to employment opportunities. One of the principal purposes of Equity's regulations is to insure that minimum wage scales not be undermined by commissions charged by agents.

In *Carroll,* the Court held that similar agency regulations by the American Federation of Musicians ("AFM") were protected by the statutory exemption of the antitrust laws. Like Equity's* agency regulations, the AFM's regulations sought to protect union members from abuses by booking agents acting on their behalf, and to preserve minimum terms and conditions of employment. In affirming the decisions of the District Court and Court of Appeals on this issue,** this Court found (1) that the agents were in an economic interrelationship with the union members affecting legitimate union interests and were therefore part of the labor group within the meaning of the statutory exemption to the antitrust laws, and (2) that

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* The parallel to the legitimate theatre field was noted by the District Court in *Carroll,* 241 F.Supp. 865, 892-93:

"Apparently, similar abuses by booking agents existed in other fields, too. *Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929) (actors)."

** The Court of Appeals in *Carroll* affirmed the District Court in upholding the agency regulations.

It should be noted that Justice White's dissent in *Carroll* (referred to in the Petition, pp. 15-16) focussed not on the AFM's regulation of booking agents, but on the AFM's requirement that band leaders functioning as employers charge fixed prices to customers which exceeded the leader's total "wage bill" (391 U.S. at 117). The latter issue is not present in this case.

the regulations were instituted for a legitimate union purpose.

Based on the same considerations, both courts below correctly held the statutory labor exemption shields Equity's agency regulation from antitrust liability.

The grounds relied on by petitioners in their attempt to distinguish the instant case from *Carroll* are inaccurately characterized, and/or irrelevant to the core statutory labor exemption criteria.

Thus, petitioners incorrectly suggest that the AFM's agency licensing system applies only to booking agents who book musicians into "club-date" engagements, where there are typically no collective bargaining agreements.* In any event, the existence of collective bargaining agreements merely obviates the need for a specific prohibition against one of many agency abuses, *i.e.*, negotiating less than minimum scale. It in no way affects the need for regulations which address other legitimate union concerns, including

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* The Second Circuit's *Carroll* decision noted that both the steady engagement field and non-club date single engagements "are ordinarily governed by collective bargaining agreements concluded by the union and the 'purchaser' of music." 372 F.2d at 158. It went on to observe:

> *Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions,* because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the Union. *The licensing agreements limit the commissions of booking agents to 10% for steady engagements* and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale.

Id. at 159 (emphasis supplied). The presence of collective bargaining agreements outside the club date field was also noted by the District Court (241 F.Supp. at 883-884) and by this Court (391 U.S. at 104, n. 6).

the regulation of commissions and the preservation of minimum scale from invasion by agents' commissions.*

Nor does the regulation of theatrical agents by the State of New York affect the exemption of Equity's agency regulation from the antitrust laws. While the Court in *Carroll* was silent on the issue of government regulation, the AFM licensing agreement before the Court in *Carroll* clearly assumed the existence of state regulations by requiring the licensed agent to "comply with all the laws, ordinances, and requirements of the different localities applying to such agencies," and the New York General Business Law clearly includes agents representing musicians in its ambit.** More fundamentally, the existence of a state statute providing some protections to members of a labor union should not affect the union's right to provide greater protections.***

The economic interrelationship between an agent and the union member whose employment he obtains is one clearly

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* Both courts below found that the same bona fide union concerns regarding exploitation that were present in *Carroll* were present here. Contrary to Petitioners' contention (pet. 15), record evidence supports the dual court findings. (*See, e.g.*, Appellees' Brief to the Court of Appeals, Docket No. 79-7821, p. 5).

** The New York General Business Law set a twenty-percent ceiling on commissions on employment booked for orchestras in the opera and concert field, App. G7, Par. 8, while the AFM regulations permitted only fifteen percent commission and barred commissions on scale compensation.

*** Even assuming *arguendo* (and there was evidence to the contrary) that New York's law is adequately enforced, Equity's agency regulation system protects its nationwide membership and not only those dealing with agents who operate in New York. Moreover, the New York law fails even to address crucial aspects of the actor-agent relationship which are covered by Equity's agency regulations. For example, Equity regulates the duration of exclusive contracts between actor and agent and provides for release of an actor from an exclusive contract where the agent has not provided work within specified time limits or where sub-agents whom the actor relied upon to be working with him have left the agency.

affecting legitimate union interests whether or not the agent happens to be a full-time agent, a part-time agent, or an agent who sometimes functions as a performer. Petitioners offer no rationale for their contention that the court below (and other courts in other cases) have "indiscriminately extended" *Carroll* to cases involving full-time professional independent agents (Pet. 12). Indeed, some of the petitioners in *Carroll* functioned solely as agents. *See* 391 U.S. at 103, n.5.

Petitioners argue that the Second Circuit improperly extended *Carroll* to "permit unions to require agents to work for nothing." The AFM's licensing agreement in *Carroll,* like Equity's agency regulations, prohibited commission on scale jobs. As was reflected in the testimony at trial, the nature of the talent agency business involves a gamble. An agent may on some occasions expend efforts without remuneration in an effort to develop a relationship with an actor who will hopefully soon command high earnings, and on other occasions reap 10% of a high weekly salary over an extended period of time for doing little more than picking up the telephone.

Finally, Petitioners contend that the Court of Appeals erroneously upheld the franchise fees charged by Equity to agents. Equity's nominal fees ($60 per year per agent) yield approximately $12,000 per year (App. A4(c)).* The Second Circuit and the District Court found, respectively, that the franchise fees are not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system" (App. A4(c)) and are "reasonably related to the operation of the franchise systems and the

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* The evidence disclosed that the administrative costs of the franchising system exceeded the income from these nominal fees. *See, e.g.,* Trial Transcript p. 643.

system's protection of wage scales and working conditions" (App. B9(c)). A factual finding by two courts should not be disturbed in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The Court of Appeals properly found that the Union's imposition of fees to offset the cost of the franchising system was "within the area of the union's legitimate self-interest," and not an "exaction[] . . . unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor" (App. A4(c)).

C. Petitioners' Tacit Invitation to Overrule *Carroll* Should Be Declined.

To the extent Petitioners are suggesting that *Carroll* should be overruled, this invitation should be rejected. Petitioners fail to present any justification for this Court's departure from a policy of *stare decisis* which applies with particular force in the area of statutory interpretation.* Very little litigation has been occasioned over the application of *Carroll*, and its continuing validity was recently noted by this Court in *Connell, supra*, 421 U.S. at 622.

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* *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 671, n. 14 (1974), quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: New York, New York
October 20, 1980

Respectfully submitted,

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